WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 2016

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Dane
La Crosse
Milwaukee
Waukesha
Waupaca

TUESDAY, NOVEMBER 1, 2016

9:45 a.m.	14AP2278/2279	Ricardo M. Garza v. American Transmission Co.
10:45 a.m.	16AP923-W	Universal Processing Services v. Circuit Court of Milw. Co.
1:30 p.m.	14AP1795-D	Office of Lawyer Regulation v. Kyle Hanson

THURSDAY, NOVEMBER 3, 2016

9:45 a.m.	15AP1152	Voces de la Frontera, Inc. v. David A. Clarke, Jr.
10:45 a.m.	14AP1914	McKee Family I, LLC v. City of Fitchburg

WEDNESDAY, NOVEMBER 9, 2016

9:45 a.m.	14AP2360	Dennis A. Teague v. Brad D. Schimel
10:45 a.m.	13AP2882	Dr. Randall Melchert v. Pro Electric Contractors
1:30 p.m.	14AP2813-CR	State v. Jeffrey P. Lepsch

THURSDAY, NOVEMBER 10, 2016

9:45 a.m.	13AP950	State v. Thornon F. Talley
10:45 a.m.	15AP1055	Lela M. Operton v. LIRC

Note: The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. If your news organization is interested in providing any camera coverage of Supreme Court argument in Madison, contact media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

Wisconsin Supreme Court
9:45 a.m.
Tuesday, Nov. 1, 2016

2014AP2278-79 Garza v. ATC

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Waupaca County, Judge Mark J. McGinnis, reversed
Long caption: American Transmission Company LLC and ATC Management, Inc., Plaintiffs-Appellants-Respondents, v. Ricardo M. Garza and Julie L. Garza, Defendants-Respondents-Petitioners.

Issue presented: These consolidated cases arise from a dispute between American Transmission Company (ATC) and Ricardo and Julie Garza as to whether ATC has an easement over the Garza's property to clear vegetation that lies within 40 feet of the centerline of ATC's transmission line.

Some background: The legal dispute began in 2011, when Ricardo M. and Julie L. Garza filed an action seeking to void ATC's easement on their property. ATC in turn sought a declaration that ATC has an easement to clear the vegetation.

The history of the easement dates back further, however. In June 1969, the Garzas' predecessors in title, Jerome and Betty Hertig, granted ATC's predecessor, Wisconsin Public Service Corporation (WPSC), a transmission line easement (the "easement"). Later that year, WPSC built a single-circuit transmission line on wood poles along the centerline described in the easement, which was then located on land owned by the Wisconsin Department of Transportation.

In 1977, the Hertigs' property was subdivided into multiple parcels. In 1994, the WPSC issued an order authorizing the reconstruction and replacement of several transmission lines in Wisconsin. Pursuant to that order, in 1995, WPSC replaced the 1969 transmission line with a double-circuit transmission line, with one circuit carrying the same voltage as the 1969 transmission line, and the other circuit carrying twice the voltage as that carried by the 1969 transmission line.

The 1995 transmission line utilized steel poles to support the conductors, which are located generally along the centerline described in the easement. One of the Garzas' arguments is that this action effectively terminated the 1969 easement. In 2001, WPSC assigned the easement to ATC.

In 2004, the Garzas purchased their property. They were aware of the easement. The centerline of the electrical transmission line lies to the west of the Garzas' property, however, a small triangular strip of the Garzas' property lies within 40 feet of the centerline line and, thus, within the easement.

In 2010, ATC notified the Garzas that vegetation on their property within the easement needed to be trimmed or removed. ATC commenced removing the vegetation. The Garzas (claiming that ATC trespassed) objected and refused to permit ATC to remove all the offending vegetation.

The Garzas allege that the easement was invalid, that ATC had illegally cut down trees on their property, and they sought relief in the form of inverse condemnation.

ATC says it has the right to remove vegetation on that portion of the Garzas' property that lies within the 40-foot easement and sought to enjoin the Garzas from interfering with the removal of vegetation. The Garzas counterclaimed alleging that ATC's easement was extinguished or did not give ATC the right to build, maintain, and operate the 1995 transmission line.

The circuit court consolidated the cases, granting summary judgment in favor of ATC, and dismissed the Garzas' claims. The circuit court determined that the replacement of the wood support poles with steel poles and the change in the number of electrical circuits did not invalidate the 1969 easement.

The circuit court was persuaded by language in the easement providing WPSC, and its assignees, with the ability to change the transmission lines as needed or in response to technological advances.

The Garzas appealed, and the Court of Appeals reversed.

In taking the case to the Supreme Court, ATC says that the Court of Appeals incorrectly fixated on three words in the easement – "wood pole structures." ATC contends that, by reading this term in isolation, the court misunderstood the easement's purpose and thus misinterpreted the easement. ATC maintains that, properly interpreted, the easement grants the right to replace wood poles with poles of any other material because the easement allows ATC to "chang[e], repair[]," "replac[e]," "safeguard[]," and "do any and all other acts necessary" to properly erect, maintain, and operate the transmission line.

A decision by the Supreme Court could determine the existence of an easement, and whether an easement allows the cutting of brush and trees to prevent interference with the operation of the transmission line.

Wisconsin Supreme Court
10:45 a.m.
Tuesday, Nov. 1, 2016

2016AP923-W Universal Processing Services v. Circuit Court of Milw.

Supreme Court case type: Petition for Supervisory Writ
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge John J. DiMotto
Long caption: State of Wisconsin ex rel. Universal Processing Services of Wisconsin, LLC, Petitioner, v. Circuit Court of Milwaukee County and the Honorable John J. DiMotto, presiding, Samuel B. Hicks and Merchant Card Services, Inc. Respondents.

Issue presented: In this case, the Supreme Court has agreed to consider using its supervisory authority over lower courts to determine if a lower court may have overstepped its authority. More specifically, the Court reviews whether a circuit court may, without the consent of the parties, appoint a referee to handle all pre-trial matters in a case going to trial and issue orders that will be approved as orders of the circuit court, without hearing, either automatically or under an abuse of discretion review, with all costs of the referee to be borne by the parties.

Some background: Universal Processing Services of Wisconsin, LLC, doing business as Newtek Merchant Solutions, became involved in a business contract dispute with Samuel B. Hicks and his company, Merchant Card Services, Inc.

Newtek provides bank card processing services to businesses that want to allow their customers to pay with credit, debit, or gift cards. Hicks agreed as an independent contractor to solicit customers to enter into contracts with Newtek for bank card processing services; engage in client development and customer relations efforts; and perform due diligence regarding merchants, including personal site inspections, to ensure that customers do not expose Newtek to unreasonable risk.

On April 16, 2014, Newtek sent Hicks a formal notice that Hicks was not performing his contractual duties. Newtek ultimately allowed Hicks four months to comply with his contract, which Newtek says Hicks failed to do. On Aug. 27, 2014, Newtek terminated Hicks's agency for cause.

After termination, Newtek said it learned that Hicks was soliciting Newtek's customers and disclosing Newtek's confidential and trade secret information to Newtek's competitors, in violation of Hicks's continuing non-solicitation and non-disclosure obligations to Newtek. Newtek sent Hicks a cease and desist letter.

In Sept. 2014, Newtek sued Hicks and his company for breach of contract, intentional interference with Newtek's contracts with its merchants, breach of fiduciary duty, misappropriation of confidential information, and misappropriation of trade secrets. Newtek demanded a jury and paid the jury fee. Newtek also sought and obtained a temporary restraining order barring Hicks from soliciting Newtek's merchants or disclosing confidential information and secrets. The temporary restraining order was continued as a temporary injunction after briefing and two hearings before Judge John J. DiMotto, Milwaukee County Circuit Court.

Hicks and his company brought counterclaims, alleging that Newtek breached the contract terminating Hicks without cause and that Newtek intentionally interfered with Hicks's

relationship with a business partner. Hicks and his company claimed that Newtek caused them nearly $17 million in damages. Newtek disputes those allegations.

At a Feb. 17, 2015 hearing, the circuit court informed the parties that, pursuant to Wis. Stat. § 805.06, the court was going to appoint a special master/referee (SMR) to oversee discovery in the case, and it directed Newtek to draft a proposed order appointing retired Judge Michael J. Skwierawski as SMR to oversee discovery.

Skwierawski informed counsel they should submit any objection to his proposed order both to the circuit court and to him. Counsel for Newtek immediately contacted Newtek to discuss the proposed order and prepare objections. However, by the following morning, Skwierawski informed the parties that the circuit court had already entered the proposed order that Skwierawski had drafted. The order also provided that the SMR is to be compensated at the rate of $450 per hour, plus expenses, to be paid by the parties.

According to Newtek, the order drafted by Skwierawski was far more extensive than the scope initially indicated by the circuit court. The order of appointment provides that any ruling of the SMR is automatically confirmed as an order of the circuit court, unless a party presents the circuit court with exceptions to the ruling within five business days. The order also provides that, if an exception is filed, the circuit court will, without a hearing, affirm the SMR's order unless "the ruling is based on an erroneous exercise of discretion."

Newtek says that since Feb. 17, 2015, the SMR has heard every matter raised in the case, issued orders on more than 20 matters, and effectively has been the de facto judge. It says the circuit court has approved, without modification, every order the SMR has issued in every instance without a hearing and in nearly every instance without any analysis or discussion beyond a statement that the SMR's ruling was a "proper exercise of discretion."

Newtek says it had no opportunity to provide input or object to the order of appointment before it was entered. Newtek argues the circuit court's appointment and the SMR's orders pursuant to the referral are invalid regardless of content. Newtek says the statute does not expressly authorize a circuit court to delegate the power to issue such orders.

On Feb. 4, 2016, Newtek filed a petition for interlocutory review of the circuit court's Jan. 21, 2016 decision. On April 6, 2016, the Court of Appeals denied the petition on the basis that it failed to satisfy the requirements for interlocutory appeal.

Newtek says in actions to be tried by the court, the court "shall" accept the referee's findings of fact unless clearly erroneous. See § 805.06(5)(b). In jury matters, a referee may not find facts. See § 805.06(5)(c). A referee's report is admissible as evidence and may be read to the jury, but the circuit court must first rule on legal objections to the report. Newtek says in all instances, the circuit court must exercise its independent legal judgment before action is taken on a referee's report.

Newtek also contends that to date, the parties have submitted thousands of pages of documents to the SMR for consideration, both in hard copy and electronically. It says the SMR does not have an office to store the documents and has no staff to organize the file. It says the SMR has no law clerk, and the SMR's order do not show he has conducted any independent research or reviewed any important directives from this court in cases decided after the SMR's retirement. Newtek argues the SMR simply lacks the resources to duplicate the efforts of a circuit court judge, and the SMR's orders have reflected this.

A decision by the Supreme Court is expected to clarify the scope of the statute and the authority of the court to delegate judicial powers to a referee.

Wisconsin Supreme Court
1:30 p.m.
Tuesday, Nov. 1, 2016

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court.

2014AP1795-D OLR v. Hanson

Supreme Court case type: Lawyer discipline
Long caption: Office of Lawyer Regulation v. Kyle Hanson

Issue presented: The Supreme Court reviews the referee's factual findings and legal conclusions regarding the misconduct charges against the lawyer in this case. If it affirms any of the referee's conclusions of professional misconduct, it will determine what would be the appropriate level of discipline.

Some background: Atty. Kyle Hanson was admitted to the practice of law in Wisconsin in June 2011. He is also licensed in the state of Illinois. He maintains an office in each state – one in Madison and another in Barrington, Illinois. He has not previously been the subject of professional discipline.

The charges of professional misconduct against Hanson arise out of his representation of C.M. and A.M. in a civil lawsuit. C.M. and A.M. sued the owners of a neighboring cottage alleging that the defendants' construction of a new garage on their property had diverted the normal flow of water into C.M. and A.M.'s cottage and had caused serious flooding. Hanson took over the representation of C.M. and A.M. in this case in 2012, following a remand from the Court of Appeals in late 2011.

On April 4, 2013, defendants' counsel filed three motions, which were combined into a single document entitled: "Notice of Motions and Motion in Limine, Motion for Summary Judgment, and Motion for Sanctions." The first sentence of that document stated that on May 8, 2013, at 2 p.m. the defendants would move the circuit court for certain specified relief, including an order dismissing C.M. and A.M.'s complaint. Along with the notice of motions and the motions, defense counsel also filed a brief and supporting affidavits, attached to which were a number of exhibits, as well as two notices of motions for sanctions that defense counsel had previously served on Hanson and his predecessor but had not filed. Those two previous notices of motions for sanctions did not contain any hearing dates because they were sent solely to provide Hanson and his predecessor time to withdraw C.M. and A.M.'s complaint, which defense counsel asserted was without merit, before defense counsel would actually seek the imposition of sanctions. Defense counsel also filed a cover letter listing all of the documents he was filing.

On that same date, defense counsel sent an email to Hanson advising him that he was filing a summary judgment motion and asking where he should send Hanson's copy. Hanson

responded that the packet of motion materials should be mailed to his office in Barrington, IL, which defense counsel did. Hanson acknowledges that he received the packet of materials shortly after it was mailed to his Illinois office.

Hanson, however, did not appear at the May 8, 2013 motion hearing. Consequently, the circuit court orally granted the defendants' motion to preclude the testimony of the plaintiffs' expert witness and the defendants' summary judgment motion. On May 10, 2013, defense counsel submitted a proposed written order by mail and served a copy on Hanson. On May 14, 2013, Hanson sent a letter to the circuit court that included the following statement: "I did not receive notice of the May 8, 2013, hearing date for Defendants' Motion in Limine, for Summary Judgment, and for Sanctions."

The Office of Lawyer Regulation (OLR) ultimately filed a complaint against Hanson alleging that this statement had been false and that Hanson had therefore violated two rules of professional conduct: (1) SCR 20:3.3(a)(1), which prohibits attorneys from knowingly making a false statement of fact or law to a tribunal, and (2) SCR 20:8.4(c), which prohibits attorneys from engaging in conduct involving misrepresentations.

After an evidentiary disciplinary hearing, the referee determined that Hanson had violated both rules of professional conduct. He recommended that the court privately reprimand Hanson and require him to pay the costs incurred by the OLR and the referee.

Hanson has appealed portions of the referee's factual findings, legal conclusions, and recommendation for a private reprimand. In essence, he argues that the OLR did not prove to the requisite standard of proof, and the referee did not find as a matter of fact that he knowingly (i.e., with actual knowledge) made a false statement to the circuit court in his May 14, 2013 letter. Hanson contends that at most he was negligent in not seeing or appreciating that the packet of materials contained a notice of motion that actually established a May 8, 2013 hearing date for the defendants' motions. He argues that mere carelessness or negligence, however, does not constitute a violation of either of the rules at issue in this proceeding. He therefore asks the Supreme Court to dismiss the charges of misconduct against him.

The OLR argues that the evidence it presented was sufficient to prove that Hanson knew that his statement was false. It asks the court to uphold the referee's conclusions of two rule violations and to impose the recommended private reprimand.

Wisconsin Supreme Court
9:45 a.m.
Thursday, Nov. 3, 2016

2015AP1152 Voces de la Frontera, Inc. v. Clark

Supreme Court case type: Petition for Review
Court of Appeals: District I
Circuit Court: Milwaukee County, Judge David L. Borowski affirmed
Long caption: Voces De La Frontera, Inc. (Voces) and Christine Neuman Ortiz, Petitioners-Respondents-Respondents, v. David A. Clarke, Jr., Respondent-Petitioner-Appellant-Petitioners

Issues presented:

- Does the Wisconsin Open Records Law require the records custodian of a local law enforcement agency to produce federal immigration detainer hold documents (I-247s) received from U.S. Immigration and Customs Enforcement (ICE), despite the specific prohibition contained in 8 C.F.R. § 236.6?
- In the alternative, does the balancing test set forth under the Wisconsin Open Records Law weigh in favor of the non-production of these same federal immigration detainer hold documents received by a local law enforcement agency from Immigration and Customs Enforcement (ICE)?

Some background: On Feb. 5, 2015, Voces de la Frontera, Inc. submitted an open records request to Milwaukee County Sheriff David A. Clarke Jr. for copies of all I-247 forms he had received from ICE since November of 2014. On April 2, 2015, Clarke provided redacted copies of 12 I-247 forms. Records custodian Cpt. Catherine Trimboli redacted subject ID, event number, file number, nationality, and a series of boxes pertaining to immigration status.

On April 7, 2015, Clarke produced revised redacted forms, this time disclosing the nationality of the detainees. Voces filed a writ of mandamus in Milwaukee County Circuit Court seeking full disclosure of the redacted items under Wisconsin's open records law. The circuit court held a hearing on May 6, 2015 at which Trimboli testified she determined that the I-247 forms were records, and none of the statutory exceptions to the disclosure of the forms applied. She said she understood that she needed to conduct a balancing test and that she deferred to ICE to make the determination on whether and what to redact.

On June 3, 2015, the circuit court granted Voces' writ, noting Wisconsin's "long history of favoring openness in government, ..." The court noted it was the sheriff's burden to show that the public interest favoring redaction outweighed disclosure, and the court found "there was never a very good reason given as to why that information should be redacted other than ICE . . . believes it should be redacted."

The Court of Appeals affirmed. The appellate court said from the plain language of both the I-247 form itself and 8 C.F.R. § 287.7, it was clear that DHS merely sought custody with a "request," not an order, for a 48-hour hold after the alien was to be released from state custody. It said this conclusion was also supported by the fact that 8 C.F.R. § 287.7(e) makes clear on its face that the detainer itself is only a request. It said the statute provides, "No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, *until actual assumption of custody by the Department*[.]" 8 C.F.R. § 287.7(e).

Clarke successfully sought an emergency stay from the Wisconsin Supreme Court while he petitioned for review. Clarke argues that the forms were protected from disclosure because information about detainees who are being held for the federal government is specifically exempt from disclosure under 8 C.F.R. § 236.6, and principles of the Freedom of Information Act (FOIA).

Clarke says the court of appeals "misconstrued and misapplied federal regulation 8 C.F.R. § 236.6 and the federal Freedom of Information Act (FOIA) to Wisconsin's Open Records law." He argues because the documents at issue were federal documents that contained both law enforcement information and sensitive and confidential information relating to immigration detainees, principles contained both in Wisconsin's open records law and the federal FOIA supported the conclusion that the balance should be struck in favor of non-production.

According to Clarke, the language in the regulation is clear that it applies to inmates being detained in state, local, or private facilities on behalf of the federal government and there is no need for actual federal custody.

Voces contends the court of appeals correctly held that only those federal laws that specifically exempt or require the redacted information to be withheld from public access are passed through by virtue of §§ 19.36(1) and (2) as exceptions to the open records mandate. It says by its explicit terms, 8 C.F.R. § 236.6 does not apply to information about prisoners who are not actually in custody of the United States.

Wisconsin Supreme Court
10:45 a.m.
Thursday, Nov. 3, 2016

2014AP1914 McKee Family I, LLC v. City of Fitchburg

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge John C. Albert, affirmed
Long caption: McKee Family I, LLC and JD McCormick Company, LLC, Plaintiffs-Appellants-Cross-Respondents-PETITIONERS, v. City of Fitchburg, Defendant-Respondent-Cross-Appellant-RESPONDENT.

Issues presented: This case examines whether developers planning to build an apartment complex had obtained a vested right in a pre-existing zoning classification (PDD) before property was rezoned, and whether the city of Fitchburg's rezoning of the property amounts to an unconstitutional taking.

Some background: Some background: Developers McKee Family LLC and JD McCormick Company, LLC (McKee) appeal a Court of Appeals' decision affirming a circuit court order granting summary judgment in favor of the city of Fitchburg and dismissing McKee's complaint.

McKee alleges that, even though it had not yet applied for a building permit to develop property, it had obtained a vested right in the preexisting zoning classification and that Fitchburg's rezoning of the property amounted to an unconstitutional taking.

The city of Fitchburg approved the property at issue for a PDD classification in 1994, at the request of McKee's predecessor in title. At the same time, Fitchburg also approved a general implementation plan submitted by the then-owner of the property.

In 2008, McKee entered into negotiations to purchase the lots at issue, contingent on its ability to obtain approval from Fitchburg to build 128 apartment units on the lots. After neighborhood meetings at which residents expressed concern that the proposed development would have negative effects, McKee submitted a proposed specific implementation plan for Fitchburg's review.

After submission of the plan, two Fitchburg alders petitioned the city to rezone the lots at issue from PDD to R-M. R-M zoning classification provides that the lots may be developed only with single family or duplex units, which would exclude the possibility of the apartment units that McKee had contemplated. In response, McKee submitted a revised proposed specific implementation plan, which incorporated suggestions made by Fitchburg Plan Commission staff.

The Fitchburg Common Council postponed the referral of McKee's revised proposed specific implementation plan to a review commission pending the council's consideration of the alders' rezoning application.

After a public hearing and an additional session with public comment, the council approved the PDD to R-M zoning application, and the rezoning to R-M took effect before any commission review of McKee's proposed specific implementation plan. The council concluded that rezoning was "in the best interest of maintaining a stable surrounding neighborhood to reduce the density on [the] lots."

Eight months after the rezoning was approved, McKee filed a notice of claim, followed by a complaint filed in circuit court, alleging that Fitchburg's adoption of the rezoning ordinance was unlawful. Both parties moved for summary judgment. The circuit court granted summary judgment in favor of Fitchburg, concluding that McKee did not have a vested right in the PDD zoning classification.

McKee appealed, and the Court of Appeals affirmed. Among other findings, the appellate court said based on Wisconsin's longstanding bright-line "building permit rule," McKee did not have a vested right in the PDD zoning classification when Fitchburg rezoned the lots. See Lake Bluff Hous. Partners v. City of S. Milwaukee, 197 Wis. 2d 157, 540 N.W.2d 189 (1995).

The appellate court noted that in Lake Bluff this court held that a property owner's rights did not vest because the developer had not submitted an application for a building permit that conformed to zoning or building code requirements in effect at the time of application. The Court of Appeals said although Fitchburg's council approved a general implementation plan, the City never approved the specific implementation plan and no building permit application was ever submitted. Thus, the court said McKee's claims failed because it never acquired a vested right in the PDD zoning classification.

McKee argues that reexamination is needed because the rule established in Lake Bluff "works a grave injustice in cases like this."

McKee argues that expectations were developed over the course of many years of interaction with Fitchburg. It continues to assert that allowing Fitchburg to rezone the property unquestionably amounted to an unconstitutional taking of McKee's property without just compensation. It says planned development zoning is ubiquitous in Wisconsin.

The Wisconsin Realtors Association and the Wisconsin Builders Association have filed a joint amicus brief in support of the petition for review. The amici say that if allowed to stand, the Court of Appeals' decision would create tremendous uncertainty and hardship for property owners throughout the state who must obtain a permit from local governments to use or develop their property.

Fitchburg says the petition for review bears almost no resemblance to the issues originally argued in the circuit court. Fitchburg points out that the Court of Appeals ruled that McKee forfeited some arguments it raised on appeal because they had not been raised at the circuit court. Fitchburg says even if the petition raises issues that might be of interest to the Supreme Court or might fall within a substantive area ripe for exploration, this is not a case where those issues may be properly reached without violating established principles of error preservation, forfeiture, and waiver.

Wisconsin Supreme Court
9:45 a.m.
Wednesday, Nov. 9, 2016

2014AP2360 Teague v. Schimel

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Juan B. Colas, affirmed
Long caption: Dennis A. Teague, Plaintiff-Appellant-PETITIONER, Linda Colvin and Curtis Williams, Intervening Plaintiffs-Appellants-PETITIONERS, v. J.B. Van Hollen, Walt Neverman, Dennis Fortunato and Brian O'Keefe, Defendants-Respondents-RESPONDENTS.

Issues presented:

- Does Wis. Stat. § 19.356 preclude petitioners from seeking a declaratory judgment that the state Department of Justice's (DOJ) alias name policy violates Wisconsin's public records law?
- Does Wis. Stat. § 19.70 require the DOJ to correct or supplement the criminal history reports it produces in response to name-based requests about innocent subjects once those subjects demonstrate to DOJ they have no criminal history?
- Does the DOJ's alias name policy violate equal protection by discriminating irrationally against one class of "innocent" persons?
- Does the DOJ's alias name policy violate substantive due process by knowingly identifying innocent people with criminal records that are not their own?
- Is the DOJ's criminal history database sufficiently like other government databases that courts must apply the constitutional principles developed in those cases?

Some background: The state Department of Justice (DOJ) maintains a criminal history database through its crime information bureau that may be searched by the public for a fee.

The database contains approximately 1.3 million criminal history records based on 1.3 million sets of fingerprints. Each record contains a "master" name, which is the name contained in the first submission to DOJ about an individual as identified by fingerprints.

An individual may be associated in the database with multiple master or alias names or multiple birthdates or both, because individuals sometimes use various names or birthdates, have legal name changes, and because typographical errors occur.

If the search produces a match or near match to a name contained in one or more records, DOJ responds with a report. The report begins by displaying the information submitted by the requester, followed by explanatory material, followed by the criminal record that has been identified as a match or near match and a photo of the person identified by fingerprints. The report includes explanations of the method by which names are associated with fingerprints and a notice that the Crime Information Bureau (CIB) cannot guarantee that the record returned "pertains to the person in whom you are interested."

Plaintiffs Dennis Teague, Linda Colvin, and Curtis Williams argue that the Wisconsin DOJ knowingly propagates inaccurate information about them each time it releases a Wisconsin criminal history report that refers to them.

Teague's claims arise from concern that when a member of the public submits a name-based search request using Teague's name and birthdate, DOJ would release in response a report containing the criminal history record of a man named Anthony Terrell Parker. The report lists Teague's name as an alias for Parker's name because Parker has given Teague's name, together with a date matching his date of birth, to authorities as an alias. Teague argues that DOJ is obligated to provide requesters with an explanation to avoid allowing requesters to falsely suspect that Teague might have the criminal history referred to in the report.

Teague submitted fingerprints to DOJ and received an "innocence letter" in March 2009 under a process established by DOJ to clarify the record. Innocence letters indicate that the recipient has no criminal history as of that date, and that the individual should not be confused with another individual who does have criminal history reflected in the database. DOJ keeps the innocence letters it issues on file but does not reference the existence of the letters in the database or otherwise make use of the letters in responding to criminal history requests.

Teague alleges that state officials, contrary to the Wisconsin public records law, failed to or incorrectly performed the balancing test for release of records before releasing criminal history referring to Teague. He argues that state officials violated the Open Records law by failing to either correct the records or allow the filing of a concise written statement each time state officials identify Parker's information as being associated with Teague.

The circuit court dismissed the plaintiffs' statutory claims and equal protection challenge on summary judgment. The court held a trial on the remaining constitutional claims, after which it dismissed the remainder of the case.

The Court of Appeals affirmed, concluding that the plaintiffs failed to demonstrate any statutory or constitutional violations: "When it comes to challenges to decisions by authorities under the public records law *to release* records, as opposed to decisions by authorities *to withhold* records, the Legislature has precluded judicial review except in defined circumstances not presented here."

The state points out that the criminal history database was created by statute, and DOJ provides a challenge process. The state says the plaintiffs are mistaken when they claim that the existence of no history letters means that DOJ somehow "knows" who a criminal history search is about. The state says to the contrary, when someone submits a name-based search, DOJ does not know who the search is about. The state says the no history letters provide people like the plaintiffs with a tool, which the plaintiffs may use if they wish. The state says DOJ goes to great lengths to inform a reader that the reports come with limits and that follow-up inquiries should, and in the employment context, must, be made.

Wisconsin Supreme Court
10:45 a.m.
Wednesday, Nov. 9, 2016

2013AP2882 Melchert v. Pro Electric Contractors

Supreme Court case type: Petition for Review
Court of Appeals: District II
Circuit Court: Waukesha County, Judge James R. Kieffer, affirmed
Long caption: Dr. Randall Melchert, Happy Hobby, Inc. and The Warren V. Jones and Joyce M. Jones Revocable Living Trust (Plaintiffs-Appellants-PETITIONERS) v.
Pro Electric Contractors and Secura Insurance, A Mutual Company (Defendants-Respondents-RESPONDENTS)

Issues presented:

- Whether Wis. Stat. § 893.80(4) immunizes a government or any of its agents or employees from liability for causing property damage through negligent construction work.
- Does Wis. Stat. § 182.0175(2), the Diggers Hotline statute, create a ministerial duty? (The Court ordered the parties to address this issue upon granting review.)

Some background: Dr. Randall Melchert sought damages due to flooding allegedly caused when Pro Electric damaged a sewer lateral while installing a traffic light as part of a contract with the state Department of Transportation (DOT).

The Court of Appeals agreed with the circuit court that Pro Electric was acting as an agent of the DOT and was implementing a discretionary governmental decision, which thereby rendered Pro Electric immune from suit under § 893.80(4), Stats.

Melchert conceded that Pro Electric was a governmental agent for the specific auger activities that severed the sewer lateral, but Melchert argued certain discrete conduct, such as the alleged failure to identify and repair the severed sewer lateral prior to backfilling, fell outside the shield of immunity. The Court of Appeals said the summary judgment record failed to support a causal connection between Melchert's specific allegations of negligence and the alleged injury, regardless of the applicability of § 893.80(4).

Pro Electric says the Wisconsin Supreme Court previously established that where a third-party's claim against a governmental contractor is based on the allegation that the contractor negligently performed its work under a contract with the governmental entity, the contractor must prove both that the contractor meets the definition of "agent" under § 893.80(4) and that the contractor's act is one for which immunity is available. Pro Electric says this is the precise issue that the trial court and the Court of Appeals both addressed in this case.

Wisconsin Supreme Court
1:30 p.m.
Wednesday, Nov. 9, 2016

2014AP2813-CR State v. Lepsch

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: La Crosse County, Judge Ramona A. Gonzalez, affirmed
Long caption: State of Wisconsin, Plaintiff-Respondent, v. Jeffrey P. Lepsch, Defendant-Appellant-Petitioner

Issues presented: This double-homicide case examines the juror selection process and swearing-in procedures for jurors.

Some background: A jury convicted Jeffrey P. Lepsch of fatally shooting two people – a father and son – during a robbery of a family-run photography store in downtown La Crosse in 2012.

Lepsch is serving two mandatory life sentences for first-degree intentional homicide; 25 years of initial confinement and 15 years of extended supervision for armed robbery with use of force; and five years of initial confinement and 15 years of extended supervision for felon in possession of a firearm – with all sentences running consecutively.

Before the prospective jurors arrived in the courtroom for jury voir dire, the clerk of the circuit court administered the oath to the jury venire – the full panel of potential jurors – in a jury assembly room. Following voir dire, each side was allowed, and utilized, six peremptory strikes. Following trial, the jury returned guilty verdicts on all counts.

Lepsch filed a postconviction motion for a new trial, contending that he was denied his constitutional rights based on the manner in which the jury venire was sworn prior to jury voir dire, the presence of biased jurors on the jury panel, denial of the proper number of peremptory strikes, and ineffective assistance of counsel.

Following an evidentiary hearing, the circuit court denied Lepsch's motion for a new trial. Lepsch appealed, unsuccessfully. He argued that the administration of the oath to the jury venire by the clerk of the circuit court in the jury assembly room, outside of his presence, violated his constitutional rights. He also argued that he was denied his Sixth Amendment right to an improper jury because the circuit court seated jurors who were both subjectively and objectively biased.

The Court of Appeals disagreed.

In appealing to the Supreme Court, Lepsch continues to argue that the prospective jurors were sworn in improperly. He also argues that "[f]or each of the nine (9) jurors which Lepsch claims were not impartial, the proper 6th Amendment inquiry" – which he says is required by Patton v. Yount, 467 U.S. 1025 (1984) – called for the circuit court to "examine what each juror said during voir dire and determine if the juror specifically swore that he could 1) set aside his opinion and 2) decide the case on the evidence." Not doing so, Lepsch claims, was in conflict with decisions such as Patton and Oswald v. Bertrand, 249 F. Supp. 2d 1078 (E.D. Wis. 2003). A decision in this case could help clarify the standards for evaluating a juror's impartiality and for administering the oath to prospective jurors.

Wisconsin Supreme Court
9:45 a.m.
Thursday, Nov. 10, 2016

2013AP950 State v. Talley

Supreme Court case type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge Sarah B. O'Brien, affirmed
Long caption: In re the commitment of Thornon F. Talley: State of Wisconsin, Petitioner-Respondent, v. Thornon F. Talley, Respondent-Appellant-Petitioner

Issues presented:

- Was the petitioner entitled to an evidentiary hearing on his petition for discharge from Chapter 980 commitment which included information that the Petitioner had terminated sexual acting out and where a psychologist reported improvement in an important area of functioning?
- Should this case be remanded to the circuit court for a review that meets the requirements of Wis. Stat. § 980.09(2), namely, that the circuit court review all previous evaluations of a Chapter 980 Respondent?

Some background: Thornon F. Talley was found to be a sexually violent person and committed under Wis. Stat. Ch. 980 in 2005. In both 2011 and 2012 he petitioned for discharge, based in part on a report from psychologist Richard Elwood. Elwood's 2011 report opined that Talley did not meet the criteria for commitment as a sexually violent person. However, it indicated that he had not reduced his risk in the area of social and emotional functioning. The report indicated that Talley tended to isolate himself at the Sand Ridge Secure Treatment Center, although he did socialize or correspond with some members of his family. Elwood's 2011 report also noted that in the previous six months Talley had received four behavior disposition reports for failure to follow rules, disrespect, failure to follow staff directives, disruptive behavior, and sexual contact, as well as six warnings for minor incidents.

Talley was granted an evidentiary hearing on his 2011 petition. The jury determined that Talley continued to meet the Ch. 980 commitment criteria, and the circuit court entered an order continuing his commitment. The Court of Appeals affirmed, focusing on whether Wis. Stat. § 980.09(3) was facially unconstitutional as a denial of due process because it uses the clear and convincing standard for discharge petitions, rather than the beyond a reasonable doubt standard used for initial commitment proceedings. State v. Talley, 2015 WI App 4, 359 Wis. 2d 522, 859 N.W.2d 155. The Supreme Court denied Talley's subsequent petition for review.

Talley's next discharge petition, filed in 2012, contained the same diagnosis, actuarial risk assessment, and conclusions that had been found in his 2011 report. The 2012 report indicated, however, that there had been some change in the area of self regulation/lifestyle instability because there had been no sexual misconduct reports in the time period it covered. The reported also noted some "recent progress" in the area of social and emotional functioning due to Talley self-reporting an increase in social interaction. That petition was denied by the circuit court without an evidentiary hearing.

The Court of Appeals affirmed, noting that under Wis. Stat. § 980.09(1) a circuit court "shall deny" a discharge petition without holding an evidentiary hearing unless the petition alleges facts that would allow a jury to conclude that the committed person's condition had changed since the most recent order denying a discharge petition or since the initial commitment, such that the jury could properly conclude that the person no longer met the criteria for commitment under Ch. 980. The Court of Appeals continued: "If the petition repeats only the same evidence presented in support of previously unsuccessful discharge petitions, the petition must be summarily denied. See State v. Kruse, 2006 WI App 179, ¶¶34-37, 42, 296 Wis. 2d 130, 722 N.W.2d 742."

Although the Court of Appeals acknowledged the lack of sexual misconduct reports in the 2012 report, it concluded that was not a "significant change" that warranted an evidentiary hearing on Talley's 2012 discharge petition.

Talley contends that the Supreme Court needs to clarify whether the standard is "any" new fact that underlies the new expert opinion or whether the new fact must represent a "significant change." He indicates that there is a conflict between State v. Combs, 2006 WI 137, ¶¶1, 295 Wis. 2d 457, 720 N.W.2d 684 and the Court of Appeals' decision in his case. Talley also says the Supreme Court should provide guidance on when a Court of Appeals may conduct its own paper review of the discharge petition and when it should remand the case to the circuit court (along with the necessary portions of the record, such as prior reports and testimony) so that the circuit court can conduct the paper review.

Wisconsin Supreme Court
10:45 a.m.
Thursday, Nov. 10, 2016

2015AP1055 Operton v. LIRC

Supreme Court Case Type: Petition for Review
Court of Appeals: District IV
Circuit Court: Dane County, Judge John C. Albert, reversed
Long Caption: Lela M. Operton, Plaintiff-Appellant, v. Labor and Industry Review Commission, Defendant-Respondent-Petitioner, Walgreen Co. Illinois, Defendant.

Issues Presented:
This unemployment compensation case is the first appellate case dealing with "substantial fault," as that term is defined in § 108.04(5g)(a) (2013-14). The Supreme Court reviews the proper standard of review of the Labor and Industry Review Commission's (LIRC) conclusions of law in cases where the issue is whether an unemployment benefit claimant has committed substantial fault.

Some background: Lela M. Operton worked as a full-time service clerk for Walgreens from Jan. 17, 2012 until March 24, 2014. Operton averaged hundreds of cash handling transactions per day. She was well liked by Walgreens, who described her as "conscientious," "always on time," and "worked to the best of her ability."

Operton participated in Walgreens' employee training and received information on Walgreens' policies and procedures, which included training on how to process Women, Infants, and Children (WIC) program checks. She was aware that employees faced discipline for failing to follow the training checklist.

Operton made eight "cash handling errors" during her 20 months with Walgreens. The first six errors involved WIC program checks, including two instances in which she gave the check back to the customer. The last two errors occurred four days apart, with the last one involving Operton's failure to check the identification of a customer who was using a stolen credit card to make a $399.27 purchase, even though Operton knew it was Walgreens' policy for employees to check customers' identifications for credit card purchases over $50.

Operton was warned after each error, and she was discharged after the eighth occasion. Operton's explanation for her errors was that she was having personal family issues that left her homeless for a period of time during her employment with Walgreens.

Operton filed a claim for unemployment benefits. Walgreens objected to the request for benefits, claiming Operton "was discharged for violation of a reasonable company policy regarding excessive cash discrepancies" which was as a result of her "incapacity to perform." The Department of Workforce Development (DWD) initially denied benefits on the grounds of "misconduct." Operton appealed.

An administrative law judge (ALJ) held an evidentiary hearing. The ALJ accepted Walgreens' evidence that Operton's mistakes were "errors." The ALJ found that Operton's actions were not so careless or negligent as to manifest culpability or wrongful intent. The ALJ concluded that Operton was ineligible for unemployment benefits because her discharge was for "substantial fault" rather than misconduct.

The LIRC affirmed the ALJ's decision and adopted it as its own. The LIRC also made a finding not included in the ALJ's decision, i.e. that Operton's failure to check a customer's identification before allowing the customer to use a credit card was a "major infraction."

The circuit court affirmed, concluding that Operton's failures amounted to substantial fault. The Court of Appeals reversed on the grounds that Operton's failures were inadvertent errors covered by the inadvertent error exclusion from the definition of substantial fault. The Court of Appeals concluded there was no evidence to show that Operton committed a "major infraction."

The appellate court noted that in 2013, the legislature enacted amendments to Wis. Stat. § 108.04(5) and (5g). The appellate court said the legislature replaced the Boynton Cab common law definition of misconduct , [Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941)], with a new statutory definition, and as a result, the LIRC's almost 80 years of experience interpreting Boynton Cab had diminished importance. The LIRC says the Court of Appeals erred in concluding that the Boynton Cab analysis is no longer useful.

The Court of Appeals noted the parties disputed the appropriate level of deference to afford the LIRC's decision. The LIRC argued for great weight deference, saying it has longstanding experience interpreting the statutory scheme as the determination of misconduct under the former statute and the determination of substantial fault under the new statute was similar. The LIRC asserted that when deciding if the substantial fault standard has been met, it looks at many of the same facts and circumstances it has reviewed since Boynton Cab.